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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

INLAND TRUCKING CO. and WESLEY MEILAHN, co-partners d/b/a OSHKOSH READY MIX CO.; COOK & BROWN LIME CO.; INLAND TRUCKING CO., and WESLEY MEILAHN, co-partners d/b/a WAUPUN READY MIX,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

GENERAL TEAMSTERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1971

NO.

INLAND TRUCKING CO. and WESLEY MEILAHN, co-partners d/b/a OSHKOSH READY MIX CO.; COOK & BROWN LIME CO.; INLAND TRUCKING CO., and WESLEY MEILAHN, co-partners d/b/a WAUPUN READY MIX,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

GENERAL TEAMSTERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners, the employers herein, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 12, 1971 (App. 1).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 440 F.2d 562 and in the Appendix at page 4. The Decision and Order of the Board is reported at 179 NLRB No. 56 (1969) and in the Appendix at page 11.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1971. The jurisdiction of this Court is invoked under 28 USC §1254(1) and §10(e) of the National Labor Relations Act, as amended, 29 USC §160(e).

QUESTIONS PRESENTED

1. Whether an employer interferes with, restrains, or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Relations Act in *per se* violation of Section 8(a)(1) of the Act where the employer uses temporary employees during a lawfully instituted offensive lockout.

2. Whether an employer discriminates against its regular employees to encourage or discourage union membership in regard to hire or tenure of employment or any term or condition of employment in violation of Section 8(a)(3) of the National Labor Relations Act where (a) the employer uses temporary employees to support and protect the employer's collective bargaining position during the period of a lawfully instituted offensive lockout, and (b) the use of the temporary employees is not motivated by an anti-union purpose.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 USC §151, et seq.) are as follows:

> "Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *"
>
> "Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7; * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *."

STATEMENT OF THE CASE

The facts are set forth fully in the decision of the Trial Examiner which was summarily adopted by the Board (App. 13).

Each of the employers had labor contracts with the Union. The contracts had a common expiration date of May 1, 1968. The employers negotiated jointly with the Union in contract renewal negotiations in 1968. The pre-expiration contract negotiations failed to produce an agreement to terms of a new labor contract as a result of the Union's rejection of the Companies' three year 90¢ wage offer and the Union's adamant demand for a three year $1.85 wage increase.

Each of the employers commenced a lockout on May 2, 1968. The lockout was terminated about 11 weeks later on July 17, 1968.

During the course of the lockouts, each employer hired individuals as temporary employees in order to support their bargaining positions in the labor contract negotiations with the Union and to maintain and preserve to some degree their business operations and commitments in the interim period.

The Union filed unfair labor practice charges with the Board alleging that the lockouts and the hiring and use of the temporary employees during the lockouts violated Section 8(a)(1), (3) and (5) of the Act. The General Counsel of the Board issued a complaint on September 30, 1968, alleging only that the use of the temporary employees during the lockouts violated Section 8(a)(1) and (3) of the Act. The Trial Examiner in his decision which issued on March 7, 1969, found that unfair labor practices were committed as alleged in the complaint. The Trial Examiner's decision was summarily adopted by the Board in its decision which issued on October 27, 1969.

Pursuant to Section 10(f) of the Act, the employers petitioned the Court of Appeals for the Seventh Circuit for review of the Board's decision and order. The Board cross petitioned for enforcement of the decision and order. The Court of Appeals rendered its written opinion on March 29, 1971, ordering entry of judgment enforcing the application for enforcement (App. 3 and 4). The Court's decree was entered May 12, 1971 (App. 1).

REASONS FOR GRANTING THE WRIT

In *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965), this Court held that there is no violation of Section 8(a)(1) or (3) of the Act where an employer locks out its employees after an impasse in labor contract negotiations has been reached for the purpose of applying economic pressure in support of its bargaining position. There was a majority of six justices in that case and concurring opinions by Mr. Justice White and Mr. Justice Goldberg, the latter joined by Chief Justice Warren.

In *NLRB* v. *Brown* (*d/b/a Brown Food Store*), 380 U.S. 278 (1965), this Court held that there was no violation of Section 8(a)(1) or (3) of the Act where the non-struck employers of a multi-employer bargaining group involved in a whipsaw strike situation locked out their employees and hired and used temporary employees during the course of the lockout to protect the integrity of the employer bargaining group so as to preserve and promote the group's bargaining objectives and in order to maintain their businesses. There was a majority of six justices in that case, a concurring opinion by Mr. Justice Goldberg joined by Chief Justice Warren, and a dissent by Mr. Justice White.

The Court below has now misconstrued the *American Ship* and *Brown Food Store* decisions and thereby erroneously denied to an employer the use of temporary employees during the course of an offensive lockout as a means of applying economic pressure in support of its bargaining position and to maintain and preserve its business.

For the reasons elaborated below, it is essential that this Court grant review since the present case presents

an ideal vehicle for this Court to decide an important question of federal law which has not been specifically settled by this Court, but which has been decided by the Court below in a way in conflict with applicable decisions of this Court.

1. The decisions of this Court in the *American Ship* and *Brown Food Store* cases neither requires nor supports the interpretation and application of Section 8(a)(1) and (3) to the questioned conduct by the Court of Appeals.

The Court below considered its task on review as involving the judicial interpretation of the scope and content of employee rights protected by Section 7 of the Act as balanced against the questioned conduct engaged in by the employers. The Court of Appeals stated that "the bargaining lockout, which was held in *American Ship* not to be inconsistent with protected employee rights, does become so if the employer does not shut down, but continues operation with temporary replacements." *Inland Trucking Co., et al* v. *NLRB,* 440 F.2d 562, 564 (CA-7, 1971) The lower court reasoned that while the offensive type bargaining lockout had the proper consequence of forcing employees to forego their job earnings, the use of temporary replacements imposed the additional price of forcing the employees to "watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain," which the lower Court concluded conflicted with the scope and content of the right to bargain collectively as protected in Section 7 of the Act. (440 F.2d at p. 564).

From this, the Court of Appeals ruled that a lockout accompanied by continued operation with temporary employees was a *per se* violation of Section 8(a)(1) and, since the questioned conduct was inherently destruc-

tive of protected Section 7 rights, Section 8(a)(3) was violated, notwithstanding that the employers' conduct was not motivated by an anti-union purpose.[1]

These conclusions are at odds with the principles enunciated by this Court in *American Ship* and *Brown Food Store.*

In addition, the lower Court noted that even if the *per se test* was not applied, the use of temporary employees would still be an unfair labor practice under Section 8(a)(3) because the employers did not come forward with evidence of legitimate and substantial business justifications for the conduct. In this respect, the lower Court interpreted *NLRB* v *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

This additional conclusion of the lower Court is also contrary to the guidelines established in *American Ship Building* and *Brown Food Store.*

In *American Ship,* the use of the lockout device "solely as a means to bring economic pressure to bear in support of the employer's bargaining position" was construed as serving a legitimate business interest. 380 U.S. at p. 308. Likewise in *Brown Food Store,* the use of the temporary personnel with the intent to preserve the integrity of the multi-employer bargaining group and to support the group's overall bargaining objectives was viewed as servicing a legitimate business end.

The motive of the employers herein did not differ in form or substance from either *American Ship* or *Brown Food Store;* i.e., they were acting to bring pressure upon the union in a seasonal fluctuation more favorable to the em-

[1] In this regard, see Lev, *Suggestions to Management: The Lockout,* Labor Law Journal, February, 1969, for a historical case review of the Board's repeated utilization of the *per se* approach to restrict the employer's right to utilize the lockout weapon.

ployers in hopes that the union would compromise an adamant and excessive wage demand. The reach of *American Ship* and *Brown Food Store* is not so short as to sanction the lower Court's limited interpretation and application of the "legitimate objectives" test of *Great Dane Trailers.*[2]

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[2] The vigorous dissent by Mr. Justice Harlan, joined by Mr. Justice Stewart, to the majority decision in *Great Dane Trailers* is noted in this regard, since the Justices prognosticated the very shift in the alteration of the burden of proof in Section 8(a)(3) cases which has occurred in the case *sub judice*. On this point, Mr. Justice Harlan stated as follows:

> "The 'legitimate and substantial business justifications' test may be interpreted as requiring only that the employer come forward with a nonfrivolous business purpose in order to make operative the usual requirement of proof of antiunion motive. If this is the result of today's decision, then the Court has merely penalized Great Dane for not anticipating this requirement when arguing before the Board. Such a penalty seems particularly unfair in view of the clarity of our recent pronouncements that 'the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus,' National Labor Relations Board v. Brown, 380 U.S., at 288, 85 S.Ct. at 986, and that 'the Board must find that the employer acted for a proscribed purpose.' American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, 313, 85 S.Ct. 955, 965.
>
> "On the other hand, the use of the word 'substantial' in the burden of proof formulation may give the Board a power which it formerly had only in §8(a)(3) cases like *Erie Resistor*, supra. The Board may seize upon that term to evaluate the merits of the employer's business purposes and weigh them against the harm that befalls the union's interests as a result of the employer's action. If this is the Court's meaning, it may well impinge upon the accepted principle that 'the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage.' American Ship Building Co. v. National Labor Relations Board, * * * ." (388 U.S. at pps. 38-39)

2. The present case presents an ideal vehicle for this Court to rule on the issue of whether Section 8(a)(1) and (3) of the Act is violated by the use of temporary employees as a means to bring economic pressure to bear in support of the employer's bargaining position, the precise issue which was specifically reserved by this Court in *American Ship*. 380 U.S. at p. 308. The importance of this question is illustrated by the number of employers affected. Thus, it can be logically assumed that the device of using temporary employees during a lockout would only be feasible to the smaller employer employing a small number of employees. It is believed that the most accurate data available in this regard is from the government publication compiled by the U. S. Department of Commerce entitled, "County Business Patterns—1969" which issued in August, 1970.[3] This publication is a statistical by-product derived from employment and payroll information reported to the Social Security Administration. In compiling the statistical data, each manufacturing location of a company is counted as a separate reporting unit. Of the 3,533,987 total reporting units, 3,370,037 of these or 95.36% of the total, employed 49 or less employees (See App. 56). It is therefore essential that this Court provide maximum possible guidance to the National Labor Relations Board and federal courts to assure that just and proper decisions in accord with the Act are reached at the lowest practicable level.

3. In *American Ship* and *Brown Food Store,* this Court corrected the Board for transgressing the firmly established principle that the bargaining strengths of the parties to the collective bargaining procedure may not be lightly impaired. The Court of Appeals here erroneously side-

[3] U.S. Bureau of Census, County Business Patterns, 1969, United States CBP-69-1, U.S. Government Printing Office, Washington, D.C., 1970.

stepped this issue by concluding that this Court's pronouncements in the "replacement measures" cases, namely *Brown Food Store* and *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), "were not considered by the Court in terms of an economic weapon legitimately used in the course of collective bargaining, but were deemed justified by particular circumstances as fair defensive responses to a situation precipitated by a strike." 440 F.2d at p. 564. This is an erroneous approval of the Board's overreaching of its legitimate function and authority under the Act so as to call for an exercise of this Court's power of review.

Free collective bargaining was meant to include the right of either the employer or union to rely ultimately on their strength to secure what they can not obtain through labor contract negotiations. *H. K. Porter Company* v. *NLRB*, 397 U.S. 99 (1970). This concept is the bedrock of the Act. *NLRB* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

The concept and principle of free collective bargaining was reaffirmed 25 years after the passage of the Act by President Kennedy's Advisory Committee on Labor-Management Policy. In its report to the President in May, 1962, the Committee reported as follows:

> "By free collective bargaining, we mean the opportunity for labor and management to work out their own problems and to arrive at voluntary agreement concerning them. All members of this committee are convinced that free collective bargaining should constitute the primary procedure by which the essential terms and conditions of employment shall be determined. Indeed, this is today, as it has been for at least a quarter-century our declared national labor policy."[4]

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[4] *Collective Bargaining — Negotiations & Contracts*, Bureau of National Affairs, Inc., Washington, D.C., Vol. 1, §10, p. 825.

This Court has construed the Act as representing "the only existing congressional expression as to the permissible bounds of economic combat." *Brotherhood of Railroad Trainmen, et al.*, v. *Jacksonville Terminal Company*, 394 U.S. 369, 383 (1969). However, the Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of bargaining demands." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 497 (1960). This principle was reaffirmed in *American Ship, Brown Food Store* and *H. K. Porter.*

The decision of the Court below represents an erroneous reading of this Court's decisions concerning the process and procedure of free collective bargaining and thus rests on an erroneous legal foundation.

The use of temporary labor, not motivated by anti-union purposes, during a lockout does not constitute an unfair labor practice under the express language of the Act and nothing in the interpretation of the Act in *American Ship* and *Brown Food Store*, or even *Great Dane Trailers*, requires a contrary conclusion.

CONCLUSION

For the reasons that have been stated, it is respectfully requested that the Justices of this Supreme Court deem it proper to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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Milwaukee, Wisconsin 53202
Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 18048

INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a OSHKOSH READY-MIX CO.; COOK & BROWN LIME CO.; AND INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a WAUPUN READY-MIX,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

GENERAL TEAMSTERS WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

JUDGMENT
(Filed May 12, 1971)

Before: KNOCH, *Senior Circuit Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of Inland Trucking Co., and Wesley Meilahn, co-partners d/b/a Oshkosh Ready-Mix Co.; Cook & Brown Lime Co.; and Inland Trucking Co.; and Wesley Meilahn co-partners d/b/a Waupun Ready Mix, to review an order of the

National Labor Relations Board issued against them on October 27, 1969, and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on September 29, 1970, and has considered the briefs and transcript of record filed in this cause. On March 29, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the above-named Petitioners, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Peititioners.

/s/ Win G. Knoch
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Roger J. Kiley
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Thomas E. Fairchild
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:
Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit
By *H. K. McCormack*
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Monday, March 29, 1971

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 18048

INLAND TRUCKING CO., and WESLEY MEHLAHN, CO-PARTNERS, etc., et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

GENERAL TEAMSTERS WAREHOUSE AND DAIRY EMPLOYEES, UNION No. 126, etc., Intervenor.

PETITION FOR REVIEW AND APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board, the answer and request for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor Relations Board on October 27, 1969, be ENFORCED, with costs, in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate judgement will be entered.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 SEPTEMBER SESSION, 1970

No. 18048

INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a OSHKOSH READY-MIX CO.; COOK & BROWN LIME CO.; INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a WAUPUN READY-MIX,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

GENERAL TEAMSTERS WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

PETITION FOR REVIEW AND APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

March 29, 1971

Before KNOCH, *Senior Circuit Judge*, KILEY and FAIRCHILD, *Circuit Judges*.

FAIRCHILD, *Circuit Judge*. The N.L.R.B. found that the petitioning employers committed §8(a)(1) and §8(a)(3)

unfair labor practices by locking out their employees, while continuing to operate by hiring temporary substitutes. Petitioners took this action upon the expiration of collective bargaining agreements, the negotiation of new agreements having allegedly reached an impasse. The record does not suggest that a strike was then imminent, although there was a strike after the lockout ended.

There appears to be no significant challenge to the facts set forth in the decision of the trial examiner, which was adopted, with minor corrections, by the board.[1] We deem it unnecessary to state the facts in detail here.

In *American Ship*,[2] the Supreme Court held "that an employer violates neither §8(a)(1) nor §8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position."

Footnote 8 of the opinion of the Court said: "we intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help."[3]

Petitioners contend, in effect, that the question left open in *American Ship* requires an answer favorable to employers. Pointing to *Buffalo Linen*[4] and *Brown*[5] they

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[1] 179 N.L.R.B. No. 56.

[2] *American Ship Bldg.* v. *Labor Board* (1965), 380 U.S. 300, 318.

[3] Idem, p. 308.

[4] *NLRB* v. *Truckdrivers' Local 449* (1957), 353 U.S. 87.

[5] *NLRB* v. *Brown* (1965), 380 U.S. 278, decided the same day as *American Ship*.

say: "Stated another way, the Supreme Court has interpreted the Act as sanctioning the use of the lockout by employers as an economic tool to be utilized either *offensively* or *defensively* within the process and procedure of collective bargaining as well as sanctioning an employer's hiring and use of temporary employees during the defensive lockout. In view of this settled law, Petitioners are simply asking for the logical extension of this law to include the hiring and use of temporary employees during the period of an offensive lockout as a legitimate right of employers. The circumstances of this case present a rational and logical basis upon which to close the heretofore incomplete perimeter of employer's rights when they resort to the lockout device as an economic tool in the process and procedure of collective bargaining."

We think, however, that the suggested symmetry of permitting operation with replacement employees to accompany an offensive as well as a defensive lockout is deceptive.

We are aware of the rule that where employees strike, an employer not otherwise guilty of an unfair labor practice may replace his employees in order to carry on his business.[6] Where there is a multi-employer bargaining group, and where there is a strike against one employer, who uses replacement labor to continue to operate, the other employers in the group may lock out and use replacement labor to continue to operate as "part and par-

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[6] *NLRB* v. *Mackay Radio & T. Co.* (1938), 304 U.S. 333.

cel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike.'"[7]

These situations seem to us to be special ones in which the replacement measures taken by the employers were not considered by the Court in terms of an economic weapon legitimately used in the course of collective bargaining, but were deemed justified by particular circumstances as fair defensive responses to a situation precipitated by a strike. Such measures in such circumstances were deemed not be be inconsistent with employees' protected rights to bargain collectively or engage in concerted activities for the purpose of collective bargaining.

We note the admonition that the board does not have "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."[8] We recognize, surely, that this court does not have the authority so described. On the other hand, determination whether particular activity is in conflict or interferes with the employee rights protected by 29 U.S.C. §157 will often, as we believe it does here, involve judicial interpretation of the scope and content of those rights.

We conclude that the bargaining lockout, which was held in *American Ship* not to be inconsistent with protected employee rights, does become so if the employer

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[7] *Labor Board* v. *Brown* (1965), 380 U.S. 278, 284. The relationships of the three employers who are petitioners here are described in the decision of the trial examiner. He concluded that they "did not constitute a true multi-employer bargaining unit." In any event no strike had occurred against any employer and the record does not show that a strike was imminent.

[8] *American Ship, supra,* fn. 2, p. 317.

does not shut down, but continues operation with temporary replacements. Such lockout forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and content of that right, as protected in 29 U.S.C. §157.

We conclude that a lockout in the circumstances at bar, accompanied by continued operation with replacement labor, is, per se, an interference with protected employee rights, and, accordingly, per se, an unfair labor practice under §158(a)(1).

Under §158(a)(3) it is also an unfair labor practice to discourage membership in a union by discrimination in regard to tenure of employment. Concededly, "the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory."[9] In *Brown*, where the lockout, accompanied by operation with tempoary replacements, was a defensive measure to preserve the integrity of the multi-employer group against whipsaw strike tactics, the Court placed the case in "an area

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[9] *Labor Board* v. *Brown*, *supra*, fn. 7, p. 288.

where the improper motivation of the employers must be established by independent evidence. When so established, antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice.'"[10]

The Court has more recently stated a general rule, as follows:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.'"[11]

As already indicated, we consider the petitioner's lockouts plus use of replacements to continue operations inherently destructive of protected rights. But even if the second test just quoted be applied, we do not find that petitioners have come forward with evidence of legitimate

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[10] *Brown*, p. 288.

[11] *NLRB* v. *Great Dane Trailers* (1967), 388 U.S. 26, 34.

and substantial business justification for their insistence on continued operation during their offensive lockouts. The evidence as to seasonal fluctuation in their businesses explains no more than their preference for a labor confrontation in May rather than the peak summer period.

Petitioners argue, further, that if we do not decide wholly in their favor, the matter must go back to the board so that they may adduce further evidence. Their argument is difficult to follow. Counsel for petitioners offered an exhibit at the hearing. His brief says it was to be followed by other evidence for the purpose of showing how the competitive nature of the businesses and the history of negotiations were relevant to petitioners' bargaining positions. At the time of the offer, there was objection and then a colloquy concerning this area of proof and the possibility that admitting this evidence would be inconsistent with a rejection of certain proof previously offered by the union and challenged by petitioners. After the colloquy, counsel for petitioners unequivocally withdrew the offer. We perceive no sound reason for permitting petitioners to reopen this line of inquiry now.

The board's order will be enforced.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

179 NLRB No. 56 D-3073
Oshkosh, Wis.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a OSHKOSH READY-MIX CO.; COOK & BROWN LIME CO.; AND INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a WAUPUN READY-MIX,

and

GENERAL TEAMSTERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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Case 30-CA-835

DECISION AND ORDER

On March 7, 1969, Trial Examiner Sidney J. Barban issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondents, Inland Trucking Co. and Wesley Meilahn Co Partners d/b/a Oshkosh Ready Mix Co.; Cook & Brown Lime Co.; and Inland Trucking Co. and Wesley Meilahn Co Partners d/b/a Waupun Ready-Mix, Oshkosh, Wisconsin, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. Oct. 27 1969

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

(Seal) NATIONAL LABOR RELATIONS BOARD

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[1] We note and correct the following minor errors in the Trial Examiner's Decision which in no way affect the result in this case. On July 29, 1968, rather than July 28, 1968, Respondent Cook & Brown reached agreement with the Union over the terms of a new collective-bargaining agreement and the strike against that Respondent terminated on July 30, 1968. With regard to the locked-out employees of Oshkosh Ready-Mix, one employee indicated an intent to return on Monday following the termination of the lockout, which would be July 22, 1968, rather than July 19, 1968. Also, it appears that the picketing at Waupun took place on the second day of the lockout rather than on the first day.

TXD–94–69
Oshkosh, Wis.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a OSHKOSH READY MIX CO.; COOK & BROWN LIME CO.; AND INLAND TRUCKING CO. AND WESLEY MEILAHN CO-PARTNERS d/b/a WAUPUN READY MIX,

Respondents

and

GENERAL TEAMSTERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Charging Party

Case 30–CA–835

ALEX V. BARBOUR, ESQ., for the General Counsel.
RUSS R. MUELLER, ESQ. (DAVIS, KUELTHAU, VERGERONT & STOVER), Milwaukee, Wis., for Respondents.
ALAN M. LEVY, ESQ. (GOLDBERG, PREVIANT & UELMEN), Milwaukee, Wis., for the Charging Party.
Before *Sidney J. Barban*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This matter was heard before Trial Examiner Sidney J. Barban at Oshkosh, Wisconsin, on October 30 and 31.

1968, upon allegations in the complaint, issued on September 30, 1968, based on charges filed on May 27, 1968, that the above-named Respondents[1] had violated Sections 8(a) (1) and (3) of the National Labor Relations Act, as amended. In their answer to the complaint, Respondents denied that they had violated the Act.

Upon the entire record in this case, from observation of witnesses, and after due consideration of the briefs filed by the General Counsel, Respondents, and the Charging Party (herein called the Union), the Trial Examiner makes the following:

Findings and Conclusions

I. The Business of the Respondents; the Status of the Union

Oshkosh RM, which is a partnership of Wesley Meilahn and Inland Trucking Co. engaged at Oshkosh, Wisconsin, in the sale and delivery by truck of ready-mixed concrete to the building and construction industry, annually receives in excess of $50,000 for materials and services supplied to enterprises, each of which is an employer engaged in commerce, and annually receives at its location in Wisconsin materials valued in excess of $50,000 originating from points outside the State of Wisconsin.

Cook & Brown, a Wisconsin corporation engaged at Oshkosh, Wisconsin, in the fabrication of steel products and the sale and delivery by truck of ready-mixed concrete, fuel oil, steel products, and other related products, annually receives in excess of $50,000 for materials and

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[1] Respondents will be referred to individually herein as set forth in parenthesis: Oshkosh Ready-Mix Co. (Oshkosh RM); Cook & Brown Lime Co. (Cook & Brown); Waupun Ready-Mix (Waupun). All dates are in 1968, unless otherwise noted.

services furnished to enterprises, each of which is an employer engaged in commerce, and annually receives at its location in Wisconsin materials valued in excess of $50,000 originating from points outside the State of Wisconsin.

Waupun, which is a partnership of Wesley Meilahn and Inland Trucking Co., engaged at Waupun, Wisconsin, in the sale and delivery by truck of ready-mixed concrete to the building and construction industry, annually receives in excess of $50,000 for materials and services supplied to enterprises, each of which is an employer engaged in commerce, and annually receives at its location in Wisconsin materials valued in excess of $50,000 originating from points outside the State of Wisconsin.

Respondents concede in their answer, and it is hereby found, that Oshkosh RM, Cook & Brown, and Waupun are and have been employers engaged in commerce or in an industry affecting commerce within the meaning of the Act. It is further found that the Union is a labor organization within the meaning of the Act.

II. The Alleged Unfair Labor Practices

A. *The Issues: Positions of the Parties*

1. Simply summarized, the General Counsel rests his claim that the Respondents violated the Act upon the following stipulated facts: That on May 2, 1968, at the termination of their separate collective-bargaining contracts with the Union, each of the Respondents locked out all of their regular employees represented by the Union and that each of the Respondents thereupon proceeded to perform the work normally done by the locked-out employees by hiring new employees on a temporary

basis for the period of the lockout (some of whom, however, were retained after the end of the lockout to do other work), and by utilizing supervisors and other members of management who did not normally do such work.

At the outset, General Counsel disclaimed any contention that the lockout at its inception violated the Act, but asserted that by thereafter employing replacements for the locked-out employees and continuing operations, while maintaining the several lockouts, Respondents violated the Act.[2]

2. The Union agrees with the contention of the General Counsel that Respondents violated the Act by employing replacements for the locked-out employees in the circumstances, but asserts, in addition, that Respondents also violated the Act by locking out their employees in the first instance, and claims that the allegations of the complaint are sufficiently broad to allow this issue. The General Counsel resisted this position, stating that the Union's contentions had been considered by his office and specifically rejected.

At the hearing, the Union, in support of its position, in part, sought to adduce testimony to the effect that "the union had specifically pledged not to strike any of the employers who are Respondents in this case; that the union, further, had agreed to continue negotiating; that the union, further, had agreed to postpone negotiations

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[2] In material part the complaint alleges, "During the period from on or about May 2, 1968, until July 19, 1968, Respondents discriminated against their employees, in the units described . . . . by locking out said employees, thereby depriving them of employment, at a time when Respondents were continuing to operate their respective businesses by hiring and using replacements to perform the work normally performed by said unit employees," thereby violating Sections 8(a)(1) and (3) of the Act.

until extrinsic facts all parties were relying on for their bargaining positions were clarified; that the union would not have struck any of the [Respondents] because of the status of the negotiations." Upon objection by Respondents, the Trial Examiner held that the Union might not adduce such testimony in support of its position that the lockouts were illegal from their inception, because that would enlarge the complaint to include a violation of the Act which the General Counsel had himself abjured. See *United Steelworkers of America (Luxaire, Inc.)* v. *N.L.R.B.*, 393 F.2d 661, 664 (C.A.D.C.).[3]

In its brief the Union further argues that the lockout violated the Act because it was assertedly an improper attempt by the Respondents, each of which constituted a separate bargaining unit, to force the Union to accept a multiemployer bargaining unit.

3. Respondents' position, in essence, appears to be that in the absence of any independent evidence of union hostility, Respondents could lock out their employees and employ others on a temporary basis to do the work of the locked-out employees in aid of Respondents' bargaining positions, as a matter of legal right, under the decisions of the Supreme Court in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, and *N.L.R.B.* v. *John Brown, et al., d/b/a Brown Food Store*, 380 U.S. 278 (often referred to hereinafter, respectively, as *American Ship* and *John Brown*).

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[3] At a later stage of the proceedings, upon objection, the Trial Examiner also denied the Union's offer to prove by an official of Cook & Brown that "in his 20 years with Cook and Brown before this summer there was never a strike of Local 126 against that company; he would further testify they have bargained numerous contracts during that time and that none of the negotiations have resulted in strike activity or other forms of work stoppage."

Respondents also argue that they were justified in their actions since, in anticipation of their busy, or busier, season in the months ahead, they desired to obtain new collective-bargaining contracts before they became more vulnerable to strike action. Thus Respondents argue in their brief that "The Union's strike leverage would be greatest against Respondents in their busy season which is between July-September . . . . Against this background, Respondents' objective was to obtain a labor contract at the earliest possible date subsequent to the expiration of the most recent labor agreement and to avoid, if possible, a strike during the busy season."[4]

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[4] It appears however, as discussed at the hearing, that Respondents "do not contend that either past experience with strikes or the threat of a strike" by the Union in the negotiations in 1968 constitutes part of their defense to the complaint in this proceeding. Respondents indicated that they did not intend to adduce such evidence, in order to avoid the possibility of opening up the issue of the legality of the lockout, itself, cf. *Frito Company* v. *N.L.R.B.*, 330 F.2d 458 (C.A. 9), and the only evidence of discussion of a possible strike during the negotiations was volunteered by witness Meilahn, on cross-examination. I have considered this evidence and have accorded it no weight because of the manner in which it was given and the impression of unreliability made by Meilahn in this and some other instances, which would make me reluctant to credit the testimony without persuasive corroboration. Further, careful study of the record and the Respondents' brief indicates that Respondents' position on this matter continues to be that discussed at the hearing. If it were otherwise, it would be necessary that the record be reopened to allow the Union an opportunity to develop the issue, inasmuch as the Union was restricted in substantial part in developing this point because of the Trial Examiner's understanding that Respondents were not claiming such evidence as part of their defense.

B. *The Bargaining Relationships Prior to the Lockout*

As previously noted, the Union contends that the three Respondents did not constitute a multiemployer bargaining unit (and, in fact, denies that all three were involved in the bargaining before the lockout), but asserts that each of the three constitutes a separate bargaining unit. Respondents seem to contest this position[5] although this is not altogether clear. Thus, in their answer to the complaint, Respondents agree that each Respondent had a separate contract with the Union covering employees in separate bargaining units, "each appropriate for purposes of collective bargaining." Further, Respondents, although admitting that they negotiated jointly with the Union in 1968, did not admit (and therefore must be taken to have denied) the allegation that Respondents negotiated in 1968 as "an informal association." (But see footnote 5, *supra*.) The General Counsel seems to contend that this issue does not affect his theory of the case, no matter how decided.

Among the three Respondents, Cook & Brown has had bargaining relationships with the Union for 30 to 40 years. Oshkosh RM, so far as the record shows, has had a collective-bargaining contract with the Union since 1964. When the present owners took control of Waupun in 1965, it appears that a previous contract with the Union had recently expired. New contracts were negotiated in 1965 between each of the Respondents and the Union, which agreements expired at midnight, on the evening of May 1, 1968.

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[5] Respondents, in their brief, state that the issue to be decided in this case is "whether *three employers bound together in negotiations as an informal association* violate § 8(a)(1) and (3) of the Act by hiring and using temporary employees during a lawful lockout?" (Emphasis supplied.)

It was testified that each of these agreements was different, although the details do not appear in the record. Nor does it appear whether these previous contracts were negotiated jointly or separately. As previously noted, there is no evidence of any previous work stoppage as a result of collective bargaining between the Union and the Respondents.

It is not disputed that Cook & Brown and Oshkosh RM, both of whom are located in or near Oshkosh, Wisconsin, and are competitors in the concrete ready-mix business, negotiated jointly with the Union in 1968, prior to the lockout. It is also clear that prior to the start of these negotiations, Meilahn, one of the owners of Waupun (who are also the owners of Oshkosh RM) told the Union that Waupun wanted to delay discussion of the Waupun contract until the conclusion of negotiations for the Oshkosh RM contract, indicating a desire to continue the prior situation in which Oshkosh RM and Waupun had similar contracts with the Union, except for a wage differential of 25 cents. There is some dispute as to whether Waupun was discussed at the first negotiation meeting between Oshkosh RM and Cook & Brown and the Union, or only much later, after the Union, on April 5, formally requested, by letter, that Waupun meet and negotiate with the Union. However, it is clear that, whenever such discussions occurred (prior to the lockout), they were kept separate from the negotiations of the other two Respondents, taking place after the end of the regular negotiations for the day, and further that Meilahn's consistent position was that he wanted to delay negotiations for Waupun until the Oshkosh RM negotiations were concluded. There was, moreover, no agreement between the Union and Waupun that the Oshkosh RM contract terms would control the Waupun

agreement, with a 25-cent wage differential. Wetzel, the Union negotiator so testified. After some evasion, Meilahn conceded that this was the case. The testimony of Respondents' witness Egan to the contrary is not credited.

Prior to the lockout, there were five or six negotiation meetings, from March 29 until April 30. On April 30, during negotiations devoted to Cook & Brown and Oshkosh RM, according to Wetzel, Attorney Mueller, who first appeared at the negotiations that day, told Wetzel that there would be no further offer from the employers, and that if the current offer were not accepted, the employers would lock the employees out upon the expiration of the contracts. There was no mention of Waupun, Mueller's statement was confirmed by telegram sent to the Union the following day.[6]

Also on May 1, each of the Respondents handed to each of their employees then at work a notice reading:

> Negotiations with the Union yesterday ended in a deadlock. Our last proposal included a 90 cent wage package (30 cents each year of a 3 year contract) plus other fringes. The Union refused to budge from its previous wage demands totaling $1.85 over 3 years. We advised the Union at the meeting that there would be no work without a contract.

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[6] The telegram read: "You are hereby notified that unit employees of Oshkosh Ready Mix and Cook and Brown Lime Company will be locked out in accordance with our position given to you at our meeting on April 30, 1968. We are available to meet further if you have a new proposal. As stated to you yesterday we have nothing further to propose." The telegram was signed by Mueller, as attorney for Oshkosh RM and Cook & Brown only.

The current labor contract expires at midnight today, May 1, 1968. We believe that the Union's refusal to compromise its wage demands has created an unfortunate situation which forces us to engage in a lockout. You are hereby notified not to report to work until further notice.

C. *Events Following the Lockout*

As of May 2, Cook & Brown had 29 employees on its payroll, including 8 who were on seasonal layoff; Oshkosh RM had 8 employees on its payroll at work and 2 on layoff; and Waupun had 4 employees on its payroll at work. None of these were permitted to return to work prior to July 17, 1968.

During the lockout, the work ordinarily done by the employees who had been locked out was performed by employees hired for that purpose (some of whom were relatives of management personnel), who were given to understand that their tenure might be temporary, as well as by other management personnel who ordinarily did not engage in such work, and, in fact, had been prohibited under the Union contract from doing bargaining unit work.

Cook & Brown used seven or eight of its management people in bargaining unit work during this period, and appears to have built up its payroll of new employees to a total of nine by June 15. At Oshkosh RM, the plant manager and one of the owners did such work, and at Waupun, the plant manager was engaged in the work of the regular employees, in addition to the new employees hired for this purpose. At Oshkosh RM, the exhibits indicate a maximum of 12 new employees by June 10, while at Waupun, 4 new employees were hired between May 23 and June 19. It was testified that the new employees were inexperienced and lacked the capabilities of the regular employers who had been locked out.

On May 1, prior to the actual lockout, the Union sent a telegram to each of the Respondents advising that the Union had no intention of striking at the expiration of the current contracts, and would give Respondents at least a week's notice before a work stoppage. On May 2, after the lockout was put into effect, the Union picketed each of the three Respondents. It would appear that there was no cessation of operations at Cook & Brown and Oshkosh RM on May 2, the first day of the lockout (both hired new employees that day), although such operations must of necessity have been somewhat curtailed. It is not clear whether Waupun was substantially engaged in its regular operations that day, although its plant manager unquestionably was on the job.[7] It is indicated that the Union picketed Cook & Brown and Oshkosh RM during the entire lockout and followed trucks belonging to those Respondents; both also received reports that the Union had approached some of their customers to divert business away from the Respondents. Union Representative Wetzel admitted asking the customers' cooperation, and referring them to another ready-mix firm, Pipkorn Ready Mix, with which it then had no dispute (although it appears that this other firm was smaller and had less equipment than either Cook & Brown or Oshkosh RM). After the first day, so far as the record shows, the Union did not picket or take other action against Waupun.

During the lockout, the locked-out employees of Waupun advised management that they were willing to return to work on the basis of the company's last offer, and Attorney Mueller, for Waupun, advised Union Representative

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[7] It is noted that the parties stipulated that *"all three* Respondents continued operations during the period of the lockout" with substitute help. (Emphasis supplied.)

Wetzel that Mueller had been contacted by one such employee to the same effect. Wetzel acknowledged that an employee of Waupun also advised him that the employees had a "consultation" with the company and were willing to accept the company's last offer. Wetzel stated, however, that he was unaware of any attempt to resign from the Union during the lockout.

Also during the lockout, Respondents on several occasions refused requests by the Union that the locked-out employees be reinstated,[8] Respondents taking the position that they would be reinstated when agreement was reached with the Union. Nevertheless, according to witness Brown, Respondents decided to end the lockout prior to agreement with the Union because "it was failing to achieve its purpose [and] we desired a return to work at the earliest possible date and resumption of normal operations. This was ever on our mind." However, Brown testified, in response to a query of Respondents' counsel, that this "state of mind" was *not* shared by Meilahn.

On July 15, each of the Respondents notified the locked-out employees by letter that they would be reinstated to work, upon application, on July 17, at a rate of pay specified in the letter and otherwise under the conditions of the expired labor contracts. All of the locked-out employees of Cook & Brown returned to work on July 17, but one, who, it was later determined, had quit. At Oshkosh RM, of the eight employees who were originally

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[8] Although it was stipulated that such requests were made, both Brown, president of Cook & Brown, and Meilahn, partner in both Oshkosh RM and Waupun, in answer to direct questions from Respondents' counsel, denied that the employees had asked to return to work during the lockout.

locked out, three quit during the lockout, four returned on July 17, and one other indicated an intent to return on July 19; two employees of Oshkosh RM who were on layoff at the time of the lockout were also recalled. At Waupun all four employees returned to work.

On July 19, the employees of Cook & Brown and Oshkosh RM went on strike. Waupun was not struck and continued to operate, though no contract was signed covering that operation. On July 28, the Union and Cook & Brown reached agreement on a contract and that strike terminated. The strike against Oshkosh RM continued current at the time of the hearing in this matter.

D. *Respondents' Competitive Position*

Respondents adduced considerable testimony concerning the competitive position of Respondents in their normal markets, particularly in the ready-mix industry, the only area in which all three seem to have similar interests. According to Wesley Meilahn, the ready-mix industry is busiest in July, August, and September, estimating that business in this period is four times that of the winter and twice that of the spring period of the year. Meilahn testified that his purpose in hiring temporary employees during the lockout was "to maintain some continuity of business so that we'd have some left, at least, when the labor dispute would end. . . . to try to get a contract at the earliest possible moment before we got into the busier time of the year," at which time Meilahn considered his businesses would be more vulnerable since "the union can strike whenever they please if there's no contract."

It was testified that the normal delivery area for ready-mix concrete is within a radius of 10 miles of the plant. Within this area, during the time in question, Meilahn stated that the competitors of Oshkosh RM (located 1 mile

outside the city of Oshkosh) were Cook & Brown and Pipkorn, both located in the city, and Twin City Concrete, located west of Neenah, Wisconsin, about 12-14 miles from the Oshkosh plant. Of the four, the three plants located at the city of Oshkosh accounted for about two-thirds to three-quarters of the Oshkosh market.[9]

Waupun, which is located about 22 miles from Oshkosh, apparently has no substantial competition, the next closest ready-mix plant being located about 20 miles from Waupun.

Cook & Brown, which is also engaged in the business of supplying fuel oil (primarily for domestic consumption, though it supplies some industrial users), and in the fabrication (cutting and bending) of steel rods for building construction, asserts other additional competitive pressures in those areas. However, it would appear that Cook & Brown's contracts to keep its customers supplied with fuel oil and to keep their burners in operation are chiefly operative in the winter months, beginning in September, and peaking in January and February, with a minimum demand in July. In the summer months, its employees would be engaged in inspecting and cleaning customers' furnaces. It would appear from the list of employees prepared by the company, at the time of the lockout, Cook & Brown had three employees in this department. Though the company has several competitors in the city of Oshkosh in the supplying of fuel oil, it seems to have none in the area of servicing heating equipment.

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[9] Pipkorn's share of the market must have been small at this time considering the small number of trucks and drivers with which it was operating. Pipkorn went out of business on July 19, at the inception of the strike against Cook & Brown and Oshkosh RM.

Cook & Brown supplies steel rods to contractors on the basis, normally, of bids upon the contractor's requirements and acceptance by the contractor. The company's principal competition in this field is in the city of Chicago, Illinois. It was testified that at the time of the lockout, Cook & Brown had "many" contracts in this area, and if Cook & Brown were unable to fulfill these comitments, its customers would have difficulty in securing these materials necessary for their construction projects. This business, it was asserted, is not seasonal.

Henry J. Brown, preident of Cook & Brown, testified as to their operations:

> Our purpose in hiring temporary employees was to sustain our business commitments in the most moderate manner that we could during the period of the lockout. We have promises, business commitments to serve our customers. These are very long-term, and we felt the obligation to meet these commitments in some way. And also, to preserve our customers so when this dispute was resolved there would be work for our men on their return.
>
> * * *
>
> Our customers are long-term customers, they come back to us on a regular basis. This is true in each division of the company. There isn't a big turnover in customers. The nature of our work, at least in the building industries, is one-time. A job is done once and it's never repeated. But, the customer repeats. He comes to you on the basis of service and if you don't give him service and you don't meet your commitments and your promises, he won't come back. He's gone forever.

Vice President Egan of Cook & Brown asserted that the company could also not afford to lose a fuel oil customer because, due to the competition of other fuels and other suppliers, the loss tends to be permanent, rather than temporary.[10]

E. *Analysis and Discussion*

1. The applicable legal precedents

It is conceded that this case presents a problem of first impression, but, according to Respondents, one which is controlled by the opinions of the Supreme Court in *American Ship Building, supra* and *John Brown, supra,* in which the Court added new dimensions to the employer's right to lock out his employees in aid of substantial legitimate business rights.

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[10] Respondents, in their brief (p. 6), assert, "The uncontradicted testimony of Meilahn and Brown establishes that the hiring and use of temporary employees to perform bargaining unit work during the lockout was not intended to affect the job availability or status of the regular locked out employees. Nor was the hiring and use of the temporary employees motivated by hostility to the Union or designed as a reprisal against the employees for their affiliation with the Union. Neither did such conduct have as an objective the undermining of the Union as the collective bargaining agent for the employees in the separate collective bargaining units." However, inasmuch as these asserted negations of purpose were never publicly expressed, so far as this record shows, and particularly not at the time of the lockout when their exposition would have been significant, the Trial Examiner considers that this testimony, in the nature of statements in self-interest, is of little value in determining Respondents' purpose, which may be better judged by the evidence of *their conduct*, and has given these statements no weight. In particular it has been noted that the employees were never advised of these positions and could well infer from the notice of lockout that Respondents were seeking to undermine and weaken the bargaining efforts of the employees and their representative.

Prior to the Court's decision in *American Ship,* it was the settled rule of the Board that in normal circumstances "an employer may not during bargaining negotiations either threaten to lock out or lock out his employees in aid of his bargaining position." See *Quaker State Oil Refining Corporation,* 121 NLRB 334, 337, enfd. 270 F.2d 40 (C.A. 3, 1959), though the Board recognized that there were special circumstances in which an employer's right to protect his business against loss so overweighed the employees' right to engage in collective bargaining free from coercion by their employer, that a lockout might be justified. Thus, the Board held in *Quaker State* 121 NLRB at 337, that "lockouts are permissible to safeguard against unusual operational problems or hazards or economic loss where there is reasonable ground for believing that a strike was threatened or imminent." The only other exception to the general rule prohibiting lockouts of employees because of their exercise of bargaining rights under the Act served to sanction the use of the lockout in a multiemployer bargaining unit as a response to a "whipsaw" strike against one of its members. See *N.L.R.B.* v. *Truck Drivers Local Union No. 449, Teamsters (Buffalo Linen Supply Co.),* 353 U.S. 87, discussed further hereinafter.

Thus, while prior to the decision in *American Ship* an employer might validly lock out his employees in a good-faith effort to protect property or an important legal right against a real and imminent threat of harm (usually deriving from some act of the union bargaining agent against the employer), there was no recognized legal right on the part of an employer to take the initiative and lock out his employees as a pressure device to force a settlement in collective bargaining favorable to the employer. In *American Ship,* the Supreme Court held, at least in the situation there presented, that such an "offensive" lockout was not a violation of the Act.

In that case, the employer, American Ship Building, operated shipyards on the Great Lakes with "a highly seasonal business concentrated in the winter months when the freezing of the Great Lakes renders shipping impossible." (380 U.S. at 302.) Each of the five prior bargaining agreements between the employer and the unions representing the employees had been preceded by a strike. After extended negotiations for a new contract, during which American Ship Building expressed its apprehensions that the unions would call a strike as soon as a ship entered its repair yard, "or delay negotiations into the winter to increase strike leverage" (380 U.S. at 303-304), an impasse in bargaining was reached, and the parties separated without a date for another meeting. Union proposals to extend the prior contract for 6 months or indefinitely were rejected by the employer because these proposals would permit work stoppages during the employer's peak season. Shortly thereafter, the employer locked out its employees represented by the unions because of the unresolved labor dispute. Negotiations between the parties resumed and approximately 2 months later a new contract was signed and the locked-out employees were recalled to work.

In the circumstances there presented, the Supreme Court held that "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." (380 U.S. at 318.) In coming to this conclusion, the Court stated in another place, "This is the only issue before us, and all that we decide," specifically disclaiming any "view whatever as to the consequences which

would follow had the employer replaced his employees with permanent replacements or even temporary help." (380 U.S. at 308 and fn. 8.)

As the Board later stated, in *Darling and Company,* 171 NLRB No. 95 (slip opinion, p. 5):

> In essence, the Court held [in *American Ship*] that a lockout of employees to support a bargaining position after an impasse in negotiations had been reached was not violative of the Act. In so concluding, the Court set forth this as the test of a lockout's legality: that assuming no motive to discourage union activity or to evade bargaining exists, the test is whether the lockout is "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent . . . is required" [refrring to 380 U.S. 300 at 311].[11]

On the same day that it decided *American Ship,* the Supreme Court also issued its opinion in *N.L.R.B.* v. *John Brown, supra,* which latter decision, when read together with *American Ship,* Respondents assert, is controlling in the present case.

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[11] In *Darling and Company, supra,* the Board stated that the doctrine of *American Ship* requires a "careful evaluation of all the surrounding circumstances," and in the circumstances present in *Darling* — including the fact that the parties had bargained in good faith, that the union there had threatened to strike at its convenience over a key issue which had been the subject of a previous lengthy strike, and that the history of previous strikes gave the employer there legitimate concern over the timing of any possible work stoppage — the Board held that the employer's lockout of employees *prior to impasse* in bargaining "was neither inherently prejudicial to union interests nor devoid of significant economic justification," and thus did not violate the Act (slip opinion p. 7). The Board further stated that it would not set forth "any hard and fast rule for determining whether a particular lockout is lawful, and such determination will have to be made on a case-by-case basis." (Slip opinion p. 6, fn. 10.)

Briefly, the facts in *John Brown* were as follows: five employers engaged in the operation of several food stores had "bargained successfully on a group basis for many years" with the union there involved. During bargaining in 1960, however, in order to divide the employers and play one off against the others, the union called a strike against one of the employers, Food Jet, Inc., only—referred to, for obvious reasons, as a "whipsaw strike." The other four employers in response thereto locked out their employees for the duration of the strike. However, when Food Jet thereafter during the strike reopened its operations using supervisors and some new temporary help, the other four employers also reopened their stores with new temporary help, supervisors, managerial personnel, and relatives of such personnel. When a contract was reached with the union, all of the employers released their temporary help and restored the locked-out employees and the strikers to their jobs.

The right of Food Jet to replace its striking employees, as a defensive measure to keep its business going, was conceded, under long-established legal principles. See *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. Also, the right of the remaining four employers (which had been bargaining with the union in a multiemployer unit together with Food Jet), to lock out their employees in response to the whipsaw strike against Food Jet was not questioned. Thus the Court stated, in *John Brown*, 380 U.S. at 281-282:

> The Board and the Court of Appeals agreed that the case was to be decided in light of our decision in the so-called *Buffalo Linen* case, *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87. There we sustained the Board's finding that, in the absence of specific proof

of unlawful motivation, the use of a lockout by members of a multiemployer bargaining unit in response to a whipsaw strike did not violate either § 8(a)(1) or § 8(a)(3). We held that, although the lockout tended to impair the effectiveness of the whipsaw strike, the right to strike "is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide . . . The ultimate problem is the balancing of the conflicting legitimate interests." 353 U.S. at 96. We concluded that the Board correctly balanced those interests in upholding the lockout, since it found that the nonstruck employers resorted to the lockout to preserve the multiemployer bargaining unit from the disintegration threatened by the whipsaw strike.

However, it was the Board's contention that the facts in *John Brown* differed critically from *Buffalo Linen* because in *John Brown* the nonstruck employers had displaced their regular employees with temporary help when they reopened their operations, which the Board held inhibited the employees in the exercise of rights under the Act and thus violated Sections 8(a)(1) and (3) of the Act, even in the absence of a specific proof of improper motivation for such conduct. The Court disagreed, stating that while "the Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the serivec of significant or important business ends . . . in the setting of this whipsaw strike and Food Jet's continued operations, the respondents' lockout and their continued operations with the use of temporary replacements, viewed separately or as a single act, do not constitute such conduct." (380 U.S. at 282-283.)

The Court further stated (380 U.S. at 284-285, 286):

> In the circumstances of this case, we do not see how the continued operations of respondents and their use of temporary replacements any more imply hostile motivation, nor how they are inherently more destructive of employee rights, than is the lockout itself. Rather, the compelling inference is that this was all part and parcel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike. Since Food Jet legitimately continued business operations, it is only reasonable to regard respondents' action as evincing concern that the integrity of the employer group was threatening unless they also managed to stay open for business during the lockout. . . . The Court of Appeals correctly pictured the respondents' dilemma in saying, "If . . . the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike . . . enjoys an almost inescapable prospect of success." 319 F.2d, at 11. Clearly respondents' continued operations with the use of temporary replacements following the lockout was wholly consistent with a legitimate business purpose.
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> . . . It is no doubt true that the collective strength of the stores to resist [the whipsaw] strike is maintained, and even increased, when all stores stay open with temporary replacements. The pressures on the employees are necessarily greater when none of the union employees is working and the stores remain open. But

> these pressures are no more than the result of the Local's inability to make effective use of the whipsaw tactic. Moreover, these effects are no different from those that result from the legitimate use of any economic weapon by an employer. Continued operations with the use of temporary replacements may result in the failure of the whipsaw strike, but this does not mean that the employers' conduct is demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act. Certainly then, in the absence of evidentiary findings of hostile motive, there is no support for the conclusion that respondents violated § 8(a)(1).

In holding that respondents' conduct in *John Brown* also did not violate Section 8(a)(3) of the Act, the Court similarly stated, in part (380 U.S. at 287, 288-289):

> We recognize that, analogous to the determination of unfair practices under § 8(a)(1), when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3).
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> We agree with the Court of Appeals that respondents' conduct here clearly fits into [that] category, where actual subjective intent is determinative, and where the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus. While the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory, we

think that any resulting tendency to discourage union membership is comparatively remote, and that this use of temporary personnel constitutes a measure reasonably adapted to the effectuation of a legitimate business end. Here discontent on the part of the Local's membership in all likelihood is attributable largely to the fact that the membership was locked out as the result of the Local's whipsaw strategem. But the lockout itself is concededly within the rule of *Buffalo Linen*. We think that the added dissatisfaction and resultant pressure on memberhip attributable to the fact that the nonstruck employers remain in business with temporary replacements is comparatively insubstantial. . . . Not only was the prospect of discouragement of membership comparatively remote, but the respondents' attempt to remain open for business with the help of temporary replacements was a measure reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multiemployer bargaining unit.

When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent.

The Supreme Court had occasion thereafter, in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, to reexamine the doctrines laid down in *American Ship* and *John Brown*, though in a situation not involving a lockout. After reviewing *American Ship*, *John Brown*, and its prior decision in *Erie Resistor Corp.* v. *N.L.R.B.*, 373 U.S. 221, the Court stated (388 U.S. at 34):

> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [Emphasis in the original.]

See also *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375.

2. Conclusions

At the outset, it is perfectly clear, from the facts in this matter, that the Respondents in this case, unlike the employers in *John Brown,* did not constitute a true multi-employer bargaining unit. In fact, the allegations of the complaint admitted by Respondents concede as much. At most, Cook & Brown and Oshkosh RM were engaged in joint bargaining with the Union, with the Waupun contract to be negotiated after the others were settled. How-

ever, such joint bargaining would not affect the separate units or the rights which the parties may derive from such units. See, i.e., *Pacific Coast Shipbuilders Association,* 157 NLRB 384, 386-387. It may be that each of the Respondents, nevertheless, had a sufficient immediate self-interest in the bargaining relationship of each of the others with the Union, that each might be justified in taking some supportive action in aid of the other's bargaining, see *Newspaper Drivers & Handlers' Local No. 372* [*Detroit Newspaper Publishers Association*] v. *N.L.R.B.*, F.2d (C.A. 6, 1968), 70 LRRM 2061; cf. *David Friedland Painting Co., Inc.*, 158 NLRB 571, enfd. 377 F.2d 983 (C.A. 3, 1967), but it is not necessary to pass upon that here. The record and the cases just cited indicate that each of the Respondents had sufficient immediate interest in the bargaining to take appropriate and legitimate action in aid of the bargaining which was being conducted, in their own interest.[12] The issue is whether the action taken, the employment and use of replacements to do the work of employees who had been locked out of their normal employment, constituted such appropriate and legitimate conduct, or contravened the rights of employees in violation of the Act.

It is further quite evident from the analysis of the cases cited in subparagraph 1, above, contrary to the positions of the General Counsel and the Respondents, that the legality of the Respondents' actions in this matter (or their illegality) cannot be determined simply as a matter of

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[12] There is no persuasive evidence to support the Union's contention raised by the Union in its brief that the purpose of Respondents was to compel the Union to consent to a multi-employer unit. See *Newspaper Drivers, Local 372* v. *N.L.R.B.*, *supra*, 70 LRRM at 2063, fn. 2.

law, *per se,* wholly apart from the context in which such conduct occurred. Cf. *Darling and Company, supra.* Thus, the Supreme Court and the Board have made it abundantly plain that "once it has been proved that the employer engaged in discriminatory conduct which . . . affected employee rights to *some* extent,"—clearly the situation in the pending matter—the burden shifts to the Respondents to justify its conduct. See *Great Dane Trailers, supra* at 34 (emphasis in original); see also *Darling and Company, supra.* This manifestly requires that the Board weigh the conflicting interests of the employees and the Respondents shown by the evidence. See *John. Brown, supra; Great Dane Trailers, supra; Fleetwood Trailers, supra.*[13]

It is further evident from the fact that the Court in *American Ship* (with full knowledge of its contemporary decision in *John Brown*) specifically reserved decision "as to the consequences which would follow had the employer [American Ship Building] replaced his employees . . . with temporary help" (380 U.S. at 308, fn. 8), that the Court did not consider *John Brown* dispositive of the issue as a matter of law, apart from a consideration of the impact of such action upon the employees' rights and of the importance of Respondents' justification for its conduct. We turn then to a consideration of these matters.

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[13] Although the Court, in the course of disagreeing with the Board's conclusions in *American Ship*, also indicated some disapproval of the Board's balancing of interests there (see 380 U.S. at 317), in *John Brown*, decided the same day, the duty of the Board to accommodate these interests, subject to review by the courts, was several times restated. (380 U.S. at 282, 287-288, 290-292.) Further, in the most recent case of *N.L.R.B.* v. *Fleetwood Trailers, supra*, the Court stated (389 U.S. at 378), citing *Great Dane, supra*, and *Erie Resistor, supra*, that "[i]t is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'"

a. *The effect of Respondents' conduct on the employees' rights*

The Trial Examiner had occasion recently, in a decision adopted by the Board in *The Ruberoid Company*, 167 NLRB No. 144, to consider a very closely related problem. It was there stated, in part (slip opinion pp. 14-15):

> . . . it would appear, under *American Ship*, the question to be resolved is whether, in the absence of any other evidence of illegal motivation, the "actions taken . . . serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership." (380 U.S. at 311.)
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> While the Supreme Court has made clear in *American Ship*, at pp. 317-318, quoting from *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 447, that the Board is not warranted in becoming involved in "the substantive aspect of the bargaining process" by "functioning as an arbiter of the sort of economic weapons the parties may use in seeking acceptance of their bargaining demands," it is also clear that not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of the employer's bargaining position. See *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221.[9]

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[9] Indeed it has been suggested by thoughtful writers on the problem that in *American Ship* and *Insurance Agents*, the Supreme Court adopted a long held academic view that the Board should not attempt to determine what economic tactics should be used by the negotiators as long as the parties are engaged in a good-faith effort to reach an agreement. See, e.g., Schatzki, *The Employer's Unilateral Act, supra* [44 Texas L. Rev. 470], 485; Oberer, *Lockouts and*

It may well be argued that an employer who has locked out his employees in aid of a bargaining position does not at the same time retain a significant or legitimate interest in remaining in operation through the employment of replacements for employees thus deprived of work or by the diversion of their work to other facilities. In shutting down in aid of his bargaining position the employer exercises his option to accelerate an anticipated work stoppage to a time more favorable to himself and less favorable to the employees, and the employees may not complain that "the work stoppage which would have been the object of the strike has in fact occurred." (380 U.S. at 310.) However, the exercise of the option to shut down production, or cease services, in good-faith anticipation of offensive action by the employees, or their representative, would seem hardly compatible with the concurrent exercise of an alleged good-faith option not to close at all, but to continue in operation under another guise. The two actions are antithetical.

This may be pointed up by a comparison with the situation which obtains when an employer uses replacements, or other legitimate means, to continue in operation after a strike by his employees. In such case the employer's efforts to remain in operation are not, as such, necessarily destructive of the employees' rights to free collective bargaining or the benefits of collective

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the Law, supra [51 Cornell L.Q.], 193; note, *The Supreme Court, 1964 Term*, 79 Harvard L.R. 56, 195. Compare, however, *N.L.R.B.* v. *Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, and *Erie Resistor, supra*, both distinguishing *Insurance Agents*, in which the Board's decisions in protection of employee rights under the Act were affirmed, even in the absence of evidence of subjective bad faith or animus on the part of the employer.

action, or to the union's capacity to responsibly and meaningfully represent the employees. In a strike against an employer, the employees, usually through their representative, constitute the protagonist in the dispute, and to the extent their rights may be destroyed, this is but a foreseeable consequence of their own actions. Because the employer's action is thus defensive; in response to the employees' own concerted activity, it cannot be said, in the usual case, to be designed necessarily to destroy the exercise of the employees' rights or the capacity of the union to represent them.[10]

[10] For an instance in which the Board and the Supreme Court held that operation of the employer's business, or at least an integral part of its operation, during a strike was designed to destroy the exercise of employees' rights, and thus violated the Act, see *Erie Resistor, supra.*

The Court's decision in *John Brown* is clearly consistent with the analysis set forth. Thus the employers' action in *John Brown* in hiring temporary replacements for locked-out employees and using supervisory personnel to continue in operation was essentially *a response action* designed to counter the thrust of the Union, which the Court put on the same plane as the clearly valid action of the struck employer in replacing his striking employees and the right of the employer to initially lock out their employees *in defense against* the whipsaw strike.[14]

[14] The Court, *inter alia*, referred to "Respondents' continued operations" and "their use of temporary replacements" as a "defensive measure to preserve the multi-employer group in the face of the whipsaw strike," which the Court considered not "inherently more destructive of employee rights, than the lockout itself." (380 U.S. at 284.)

The Court further indicated at several points in its decision in *John Brown* that such harm as the employees might incur as a result of their replacement by temporary employees was but a foreseeable consequence of their own action, which the employees had within their own power to control by ceasing their strike against Food Jet.[15] Therefore, as noted above, where "the employer's action is thus defensive, in response to the employees' own concerted activity, it cannot be said . . . to be designed necessarily to destroy the exercise of the employees' rights or the capacity of the union to represent them." See *Ruberoid, supra*, slip opinion p. 15.

However, where the employer, as here, locks out his employees with the purpose of forcing them to accede to his terms and at the same time is able to demonstrate, by continued operation through other employees, that resistance to the employer's terms, whatever they might be, is unlikely of success, if not hopeless, and reemployment can be obtained only by concession to the employer's terms, the necessary, if not the almost inevitable, tendency of the employer's conduct would be capitulation. Thus if the employer not only may decide if and when his employees

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[15] Thus the Court stated (380 U.S. at 286), "The pressures on employees are necessarily greater when none of the union employees is working and the stores remain open. *But these pressures are no more than the result of the Local's inability to make effective use of the whipsaw tactic.*" (Emphasis supplied.) At another place, the Court noted that such discontent on the part of the union's membership as occufred "is attributable largely to the fact that the membership was locked out as a result of the Local's whipsaw strategem" (380 U.S. at 288), and noted that having created the situation they were in, the employees, by their "control of union policy, could end the dispute and terminate the lockout at any time" by conceding to the employers and returning to work. (380 U.S. at 289.)

shall be deprived of work, but at the same time replace those employees and continue in operation, making capitulation rather than bargaining the option presented, such action might well be said to have the tendency, which the Court found lacking in *American Ship*, to "necessarily destroy the unions' capacity for effective and responsible representation" and be "demonstrably so destructive of collective bargaining" (380 U.S. at 309) as to carry its own indicia of illegal motivation in violation of the Act. Indeed, the employer's capacity for achieving this result might well be limited only by the available labor market.

It is suggested in the present case, however, that the Respondents were unable to inflict such harm on the Union, were themselves forced to rescind their lockout, and that the Union, notwithstanding the lockout, retained sufficient strength to immediately strike two of the Respondents, Oshkosh RM and Cook & Brown. However, it is manifest that the purpose of Respondents' conduct was to force a capitulation to Respondents' terms by depriving the employees of their livelihood for an indefinite period, thus penalizing them for their resistance to those terms, and tending to weaken and divide their bargaining power. It seems evident that this is precisely what occurred at Waupun, even though the Union has not there agreed to a contract. Even at Oshkosh RM and Cook & Brown, it may be noted that the natural tendency of Respondents' conduct resulted in attrition of Union strength through members leaving permanently for other work. Thus, almost one-half of the regular complement at Oshkosh RM (three out of eight) failed to return at the end of the lockout, rather clearly indicating the effect that may be expected in such situations, particularly where, as seems to have

been the case at Oshkosh RM and Waupun, no long-established background of stable bargaining relationships have been established.[16]

In any event, assuming that the Respondents here were attempting to secure their aims in collective bargaining by discrimination in employment inflicting a maximum amount of economic injury upon the employees, which seems beyond question, the determination of whether these actions violated the Act does not depend on whether Respondents were successful. Specific proof of the successful effect of the Respondents' discrimination is not required. "It is common experience that the desire of employees" with respect to unionization or collective activity "is raised or lowered by the advantages," or disadvantages, "thought to be attained by such action." And the Board may reasonably infer such effect from the discrimination. See *The Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 51.

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[16] The Respondents seem to suggest that the Union may recoup its strength through the operation of union-shop clauses in future bargaining agreements. However, in terms of the actualities of collective bargaining, this may be open to serious question. Where, as here, the employer's tactics are purposely designed to create attrition in the strength of union support, and thus its capacity to effectively represent the employees, and, at the same time, to create in the employees a lack of confidence in the Union's capability to represent them successfully, the natural tendency of such conduct will be destructive of the Union's representative capacity. Under these circumstances, assuming that the employer has the power to carry out his purposes, the union's ability to bargain for an effective union shop, itself, may erode. These matters do not occur in a vacuum, both employees and the employer are sensitive to shifts in union bargaining power: not only is the union's bargaining strength dependent ultimately upon the employees' confidence in that strength, but also the employer's willingness to make meaningful concessions, in the last analysis, is substantially affected by his appraisal of employee support for the union.

b. *Respondents' purpose in replacing its employees*

It seems manifest to the Trial Examiner that the critical inquiry in this matter, the pivot upon which the decision must inevitably turn, concerns Respondents' justification for the conduct which is the subject of attack here. There can be little question that the necessary tendency of Respondents' conduct was to coerce the employees in their exercise of their right under Section 7 of the Act to bargain collectively through their selected representatives and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. However, it is clear from the teaching of the cases considered above (see subparagraph 1, *supra*), that where, as here, such conduct occurs in a context which reveals no other specific evidence of hostility to the Union, it becomes necessary to consider the employer's asserted reasons for his conduct which may effectively counteract the normal inference of invidious hostility inherent in the conduct itself. As in any other case, where it is shown that the employer has inflicted deliberate harm on the employees for their exercise of rights under the Act, in the absence of proof of sufficient justification for such conduct, a violation of the Act is made out. As the Supreme Court advised in *N.L.R.B.* v. *Great Dane Trailers, supra* (388 U.S. at 34), where it is shown that employee rights have been invaded by employer conduct—even though the invasion may have been "comparatively slight"—it becomes incumbent upon the employer to "come forward with evidence of legitimate and substantial business justifications for the conduct."

Thus also the Court, in *John Brown*, in rejecting an implication of "hostile motivation" in the use of temporary replacements for the locked-out employees there, noted

"the compelling inference . . . that this was all part and parcel of respondents' *defensive measure to preserve the multiemployer group in the face of the whipsaw strike*" (380 U.S. at 284, emphasis supplied), which, at another place, the Court referred to as "a measure reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multiemployer bargaining unit," and concluded that such conduct would be "prima facie lawful" "[w]hen the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served . . ." (380 U.S. at 289.)

Similarly, in both *American Ship, supra,* and in *Darling and Company, supra,* the Court and the Board, respectively, took particular note of, and largely relied upon, the fact that there was a substantial basis for the employer's conduct in each case in reaction to conduct of the union involved, which gave the employer reasonable apprehension that the union would take hostile action against employer's substantial economic interests.

In the instant case, as we have noted, there is no substantial evidence of any affirmative or overt act on the part of the Union which impelled Respondents' conduct. Moreover, Respondents assert no special situation, beyond their normal business operations, in justification of their conduct. Thus, although all three Respondents could apparently expect a substantial increase in their ready-mix business in the months ahead, there is no indication that their situation differed in any way from that in previous years in which the parties were apparently able to resolve their problems in collective bargaining without a work stoppage, either by way of lockout or strike. Nor on the basis of this record can it be found that the Respondents faced any serious or unusual competitive threat from other firms in the ready-mix business, either in 1968 or in any previous year.

In the case of the other operations of Cook & Brown, it is not apparent that Respondent would have been substantially more inconvenienced by a strike in the future, if that had occurred, than it was when it voluntarily created a work stoppage of its regular employees by locking them out. In fact, Respondents' business problems were advanced in justification of their conduct in this matter do not appear to differ materially from those common to specialty contractors in the construction industry generally and to other employers who are busier at some seasons of the year and likewise have contractual commitments to meet.

Respondents further argue, in effect, that they were justified in their actions by the fact that their contracts had expired and the Union was free to strike. This, however, is not an unusual occurrence in collective bargaining, not heretofore thought, standing alone, to justify discrimination against employees because they, or their representative, were resisting the employer's contract position. Moreover, even if the doctrine in *American Ship* may permit the employer, as a matter of law, to lock out his employees at the termination of the bargaining agreement, without any other justification (reminiscent of the labor cry of "no contract, no work," not so frequently heard today as in other years when negotiations in the coal industry were more turbulent), a matter which it is unnecessary to pass upon here, the analysis which we have made hereinabove would require some more substantial justification for that additional, significant discrimination against such employees inherent in giving their work to others, after shutting them out from employment.

Respondents however contend, in effect, that the Board is without authority to pass upon the sufficiency of the business reasons advanced to justify their conduct, assert-

ing that "the Board does not possess the general authority to act as an arbiter of the economic weapons available to the parties in collective bargaining," citing *American Ship* and *John Brown, supra.* However, while the Court, in *John Brown,* held that the employers' defensive action there could not be invalidated by the Board, the Court also confirmed the authority of the Board to weigh and consider the relevant factors in determining the legality of the conduct in question. See also *N.L.R.B.* v. *Great Dane Trailers, supra; N.L.R.B.* v. *Fleetwood Trailers, supra.*

Moreover, as has been previously noted, the decisions of the Supreme Court also make clear that not all economic injuries which may be inflicted upon employees in aid of an employer's bargaining position, or for the purpose of assisting the employer to maintain his business operation, are necessarily legitimate "economic weapons" because used in a collective-bargaining dispute. Thus, the Court, in *N.L.R.B.* v. *Erie Resistor Corp. supra,* affirmed the holding of the Board that the employer there could not, even in the absence of other proof of hostility to the union, adversely affect the seniority rights of employees on strike over the terms of a collective-bargaining contract, even though the employer claimed that such action was necessary to the continued operation of its business during the work stoppage.[17] See also, Christiansen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality,* 77 Yale L.J. 1269, 1299-1300.

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[17] It appears from the Court's decision, indeed, that the employer's actions there were undertaken "under intense competition and subject to insistent demands from its customers to maintain deliveries . . . . " (373 U.S. at 222-223.)

3. Summary

We are not here concerned with the balancing of bargaining power which the Supreme Court in *America Ship* and *John Brown* instructed the Board to eschew. We are confronted with conduct tending necessarily to coerce employees in the exercise of their rights under the Act, to discourage membership in and activities on behalf of the Union, and to prevent free collective bargaining in accordance with the purpose of the Act. Where employees are so injured in the exercise of their rights guaranteed by the Act, such conduct "carrie[s] its own indicia of [illegal] intent and . . . is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights." See *Erie Resistor, supra,* 373 U.S. at 231. However, no such overriding purpose justifying Respondents' conduct has here been shown.

In summary, therefore, it is found, on the basis of the above and the record as a whole, that Respondents, and each of them, by employing and using replacements to perform the work of employees whom Respondents had locked out, in the circumstances of this case, seriously interfered with, restrained, and coerced their employees in the exercise of rights under the Act, and discouraged membership in labor organizations by discrimination against those employees in respect to their hire or tenure of employment, without significant, substantial, legitimate justification, in violation of Sections 8(a)(1) and (3) of the Act.

Conclusions of Law

1. The Respondents, and each of them, are engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents, and each of them, have engaged in and are engaging in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act, which unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

It having been found that the Respondents, and each of them, engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act, it will be recommended that the Respondents, and each of them, cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Although it is conceded by the General Counsel, and it is herein found, that the lockout of employees in this matter was valid at its inception, it is further clear and it is found that the Respondents by employing temporary replacements converted this situation into an illegal discrimination against the employees in regard to their hire and tenure which should be remedied by restoring the employees to the status which they would have enjoyed but for these illegal acts. Since it appears that all of the employees originally locked out were offered reinstatement on or about July 17, it will be recommended that the Respondents, and each of them, shall, to the extent not previously done, restore the employees locked out on or about May 2, 1968, to their seniority and other rights and privileges, and make them whole for any loss of earnings or other benefits which they may have suffered by reason of the discrimination against them from on or about May 2, 1968, to on or about July 17, 1968, less interim earnings, and in a manner consistent with Board policy set out in *F. W. Woolworth Company,* 90 NLRB 289, and *Crossett*

Lumber Company, 8 NLRB 440, to which shall be added interest at the rate of 6 percent per annum as prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that Respondents, Inland Trucking Co. and Wesley Meilahn Co-Partners d/b/a Oshkosh Ready-Mix Co., Oshkosh, Wisconsin, Cook & Brown Lime Co., Oshkosh, Wisconsin, and Inland Trucking Co. and Wesley Meilahn Co-Partners d/b/a Waupun Ready-Mix, Waupun, Wisconsin, and each of them, their officers, partners, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in General Teamsters, Warehouse and Dairy Employees, Local Union No. 126, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by discrimination in respect to the hire or tenure of their employees.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Reinstate and make whole all employees locked out by the Respondents, and each of them, for the period from May 2, 1968, to July 17, 1968, for any loss of pay, benefits, or privileges they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personal records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(c) Post at each of their plants involved herein copies of the attached notice marked "Appendix,"[18] each of which shall be signed by an officer or partner of the Respondent operating the plant in which said notice is posted. Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondents' representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

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[18] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

(d) Notify the Regional Director for Region 30, in writing, within 30 days from the receipt of this Decision, what steps have been taken to comply herewith.[19]

Dated at Washington, D.C.

APPENDIX

Notice to All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

Under the terms of the labor laws of the United States Government, YOU HAVE THE RIGHT TO—

*Organize yourselves, or form, join, or help unions.

*Bargain for working conditions through a representative freely chosen by a majority of the eligible workers in our operations, without interference, coercion, and restraint from the company.

*Act together for the purposes of bargaining for working conditions or for other mutual aid or protection of your working conditions.

*Refuse to do any or all of these things, except as limited by law.

WE WILL NOT interfere with your right to do these things, or engage in such activities which have been guaranteed to you by law.

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[19] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondents have taken to comply herewith."

WE WILL NOT shut you out from employment, or deprive you of work in any way and give your work to others because you have joined or helped Teamsters Local 126, or any other union, or have done any of the things or have engaged in any activities which the law states you have the right to do, as set forth above.

WE WILL make whole all of the employees whom we locked out on or after May 2, 1968, for any loss of pay, benefits, or privileges they may have suffered by reason of the lockout, with interest, in accordance with the decision of the National Labor Relations Board, or its Trial Examiner.

INLAND TRUCKING CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Second Floor, Commerce Building, 744 Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414-272-8600, Extension 3861.

TABLE 1A. United States: 1969 and 1968

(Excludes government employees, railroad employees, self-employed persons, etc.—see "General Explanation." Size class 1 to 3 includes reporting units having payroll during 1st quarter but no employees during mid-March pay period. "D" denotes figures withheld to avoid disclosure of operations of individual reporting units)

SIC code	Industry	1969										
		Number of employees, mid-March pay period	Taxable payrolls, Jan.-Mar. ($1,000)	Total reporting units	Number of reporting units, by employment-size class							
					1 to 3	4 to 7	8 to 19	20 to 49	50 to 99	100 to 249	250 to 499	500 or more
	TOTAL	56 346 479	88 425 921	3 533 987	1 798 131	720 408	586 055	265 443	86 867	49 529	16 051	11 503
...	AGRICULTURAL SERVICES, FORESTRY, FISHERIES	187 748	194 616	31 462	18 990	6 764	4 074	1 273	266	79	13	3
07	AGRICULTURE SERVICES AND HUNTING	167 760	169 514	28 233	17 080	6 118	3 572	1 137	240	71	12	3
08	FORESTRY	4 875	5 504	520	273	89	100	42	11	5	-	-
09	FISHERIES	15 113	19 598	2 709	1 637	557	402	94	15	3	1	-
...	MINING	598 290	1 182 962	24 916	9 516	4 459	5 397	3 353	1 186	633	238	134
10	METAL MINING	78 784	155 624	944	364	167	151	92	47	53	31	39
11	ANTHRACITE MINING	5 535	8 790	309	115	69	69	34	15	3	3	1
12	BITUMINOUS COAL AND LIGNITE MINING	119 435	236 116	2 921	710	589	803	436	150	115	74	44
13	OIL AND GAS EXTRACTION	223 796	433 288	14 671	6 841	2 497	2 684	1 728	579	275	52	15
14	NONMETALLIC MINERALS, EXCEPT FUELS	109 332	187 559	5 152	1 324	984	1 503	890	292	112	37	10
--	ADMINISTRATIVE AND AUXILIARY	61 408	161 585	919	162	153	187	173	103	75	41	25
...	CONTRACT CONSTRUCTION	3 189 325	5 942 409	308 018	157 109	65 540	51 891	22 816	6 881	3 024	569	188
15	GENERAL BUILDING CONTRACTORS	932 647	1 655 920	64 701	43 169	18 441	13 784	5 967	2 053	1 003	217	67
16	HEAVY CONSTRUCTION CONTRACTORS	601 356	1 187 564	28 944	11 360	5 506	5 949	3 568	1 492	803	181	85
17	SPECIAL TRADE CONTRACTORS	1 628 297	3 026 409	193 771	102 503	41 512	31 982	13 143	3 256	1 181	164	30
--	ADMINISTRATIVE AND AUXILIARY	26 825	72 516	602	77	81	176	138	80	37	7	6
...	MANUFACTURING	20 193 979	37 215 299	299 161	70 329	47 676	66 008	52 155	26 664	21 423	8 465	6 461
19	ORDNANCE AND ACCESSORIES	409 204	935 622	457	74	40	38	51	39	50	30	135
20	FOOD AND KINDRED PRODUCTS	1 586 882	2 593 219	29 743	5 637	4 294	6 689	6 142	3 182	2 535	865	399
21	TOBACCO MANUFACTURES	70 547	95 155	379	68	26	68	66	43	58	24	26
22	TEXTILE MILL PRODUCTS	965 579	1 238 631	7 087	686	603	1 198	1 434	984	1 106	629	447
23	APPAREL AND OTHER TEXTILE PRODUCTS	1 407 650	1 590 530	24 627	3 901	2 819	4 972	6 073	3 584	2 368	841	269
24	LUMBER AND WOOD PRODUCTS	586 887	784 445	30 067	11 774	6 304	6 125	3 286	1 406	892	221	59
25	FURNITURE AND FIXTURES	455 456	649 028	9 410	2 175	1 479	2 129	1 707	854	696	237	133
26	PAPER AND ALLIED PRODUCTS	662 625	1 238 324	6 010	456	459	970	1 351	1 016	1 172	366	220
27	PRINTING AND PUBLISHING	1 065 503	1 936 887	36 111	11 735	7 414	8 488	4 731	1 904	1 185	389	265
28	CHEMICALS AND ALLIED PRODUCTS	880 050	1 840 919	11 361	2 529	1 808	2 425	2 028	1 043	841	342	545
29	PETROLEUM AND COAL PRODUCTS	136 804	313 327	1 827	382	303	399	307	171	149	59	57
30	RUBBER AND PLASTICS PRODUCTS, N.E.C.	560 323	955 687	6 548	1 027	790	1 345	1 410	844	682	237	213
31	LEATHER AND LEATHER PRODUCTS	329 853	400 382	3 528	530	386	643	620	415	498	340	96
32	STONE, CLAY, AND GLASS PRODUCTS	602 624	1 052 039	14 395	3 123	2 563	3 805	2 593	1 073	799	269	170
33	PRIMARY METAL INDUSTRIES	1 280 964	2 646 938	6 837	685	667	1 297	1 466	860	936	453	473
34	FABRICATED METAL PRODUCTS	1 391 634	2 582 824	26 424	4 982	3 883	6 522	5 489	2 622	1 885	637	404
35	MACHINERY, EXCEPT ELECTRICAL	1 962 236	4 032 196	37 205	9 647	6 856	9 583	5 813	2 290	1 634	691	691
36	ELECTRICAL EQUIPMENT AND SUPPLIES	1 930 967	3 590 300	10 982	1 765	1 322	1 985	1 927	1 253	1 251	666	813
37	TRANSPORTATION EQUIPMENT	2 020 619	4 511 731	7 676	1 514	1 076	1 360	1 241	791	812	337	545
38	INSTRUMENTS AND RELATED PRODUCTS	409 989	822 769	4 399	1 065	718	910	701	348	332	167	158
39	MISCELLANEOUS MANUFACTURING INDUSTRIES	429 546	614 293	13 205	3 821	2 339	3 134	2 074	953	590	199	95
--	ADMINISTRATIVE AND AUXILIARY	1 045 635	2 789 653	10 703	2 753	1 527	1 923	1 645	989	952	466	448
...	TRANSPORTATION AND OTHER PUBLIC UTILITIES	3 705 344	7 059 230	127 563	52 937	23 845	25 661	14 518	5 575	3 209	979	839
41	LOCAL AND INTERURBAN PASSENGER TRANSIT	367 664	513 883	13 222	5 289	2 438	2 757	1 660	598	314	107	59
42	TRUCKING AND WAREHOUSING	1 039 380	1 884 715	72 013	34 067	13 288	13 188	7 294	2 552	1 256	273	95
44	WATER TRANSPORTATION	160 906	275 992	4 750	1 961	921	891	497	200	160	65	55
45	TRANSPORTATION BY AIR	340 793	812 903	4 347	1 472	848	900	544	226	165	76	116
46	PIPE LINE TRANSPORTATION	15 522	38 692	712	209	113	167	157	40	19	7	-
47	TRANSPORTATION SERVICES	102 117	163 623	8 936	3 982	2 299	1 596	695	227	105	26	6
48	COMMUNICATION	1 020 721	1 934 667	12 604	2 596	2 404	3 966	1 720	827	603	201	287
49	ELECTRIC, GAS AND SANITARY SERVICE	616 806	1 344 832	10 257	3 215	1 437	2 040	1 805	825	515	210	210
--	ADMINISTRATIVE AND AUXILIARY	39 435	89 903	722	146	97	156	146	80	72	14	11
...	WHOLESALE TRADE	5 920 611	7 528 101	296 427	113 527	67 254	71 312	33 527	8 718	3 237	603	249
--	ADMINISTRATIVE AND AUXILIARY	199 532	461 224	3 629	1 086	627	837	646	254	209	95	75
...	RETAIL TRADE	10 706 530	11 122 187	1 045 632	508 373	250 359	191 169	69 432	16 588	6 659	1 613	1 219
52	BUILDING MATERIALS & FARM EQUIPMENT	449 424	595 095	63 598	28 448	16 987	14 237	3 420	387	97	17	5
53	GENERAL MERCHANDISE	2 039 762	1 964 255	59 767	24 257	11 453	11 995	6 140	2 675	1 897	737	633
54	FOOD STORES	1 584 902	1 636 015	129 606	67 759	26 454	21 408	9 501	2 582	1 234	397	271
55	AUTOMOTIVE DEALERS & SERVICE STATIONS	1 598 576	2 154 093	219 923	115 703	55 042	32 790	12 173	3 357	810	38	10
56	APPAREL AND ACCESSORY STORES	748 469	723 302	84 596	37 307	22 702	17 420	5 524	1 081	433	97	32
57	FURNITURE AND HOME FURNISHINGS STORES	447 300	613 316	64 200	30 786	16 948	12 630	3 196	465	147	23	5
58	EATING AND DRINKING PLACES	2 308 809	1 539 073	235 795	107 983	53 249	46 927	21 525	4 518	1 292	215	86
59	MISCELLANEOUS RETAIL STORES	1 175 079	1 258 450	183 789	95 246	46 627	32 882	7 243	1 131	359	76	25
--	ADMINISTRATIVE AND AUXILIARY	354 209	618 588	4 338	884	697	900	710	392	390	213	152
...	FINANCE, INSURANCE, AND REAL ESTATE	3 509 168	5 735 741	331 400	211 517	54 162	38 497	17 417	5 412	2 929	874	592
60	BANKING	942 080	1 479 575	16 791	1 357	2 720	5 793	4 078	1 471	819	293	260
61	CREDIT AGENCIES OTHER THAN BANKS	352 565	532 645	45 163	22 676	12 601	6 765	2 201	602	258	49	11
62	SECURITY, COMMODITY BROKERS & SERVICES	216 513	574 591	7 575	3 083	1 289	1 418	1 020	363	269	85	48
63	INSURANCE CARRIERS	965 114	1 757 242	28 642	9 870	4 654	6 109	4 728	1 650	1 053	337	241
64	INSURANCE AGENTS, BROKERS, & SERVICE	260 069	414 309	60 722	42 784	10 984	5 396	1 207	236	89	21	5
65	REAL ESTATE	668 345	797 270	156 630	120 565	19 381	11 665	3 686	902	351	63	17
66	COMBINED REAL ESTATE, INSURANCE, ETC.	35 539	51 224	8 756	6 289	1 575	697	141	41	10	3	-
67	HOLDING AND OTHER INVESTMENT COMPANIES	53 482	98 630	6 862	4 827	923	609	312	117	52	16	6
--	ADMINISTRATIVE AND AUXILIARY	15 461	30 255	259	66	35	45	44	30	28	7	4
...	SERVICES	9 974 335	12 035 165	979 581	596 247	184 676	122 232	46 196	15 577	8 336	2 497	1 818
70	HOTELS AND OTHER LODGING PLACES	752 439	604 463	51 885	27 943	9 167	7 618	4 160	1 765	890	228	114
72	PERSONAL SERVICES	1 029 887	995 639	183 207	116 978	37 262	20 917	5 666	1 425	656	91	10
73	MISCELLANEOUS BUSINESS SERVICES	1 506 963	2 109 128	88 722	40 074	18 310	16 741	8 057	2 963	1 787	565	225
75	AUTO REPAIR, SERVICES & GARAGES	368 054	467 204	69 612	43 916	14 387	8 419	2 330	411	132	12	5
76	MISCELLANEOUS REPAIR SERVICES	197 940	297 220	38 355	25 293	7 264	4 337	1 130	212	105	10	4
78	MOTION PICTURES	184 832	234 470	10 970	3 098	2 113	3 692	1 568	329	120	27	23
79	AMUSEMENT AND RECREATION SERVICES, NEC	414 801	423 110	38 694	19 158	7 687	7 062	3 555	863	276	61	32
80	MEDICAL AND OTHER HEALTH SERVICES	2 724 626	3 053 955	213 435	153 638	33 339	12 687	6 351	3 389	2 071	868	1 092
81	LEGAL SERVICES	225 634	317 333	68 313	54 359	9 026	3 801	835	194	82	15	1
82	EDUCATIONAL SERVICES	834 854	1 171 129	31 521	11 098	6 194	7 998	3 954	1 151	713	253	160
84	MUSEUMS, BOTANICAL, ZOOLOGICAL GARDENS	17 135	22 313	791	344	150	143	85	37	20	8	4
86	NONPROFIT MEMBERSHIP ORGANIZATIONS	1 107 102	1 094 261	122 226	65 699	27 068	19 591	6 754	1 872	939	220	83
89	MISCELLANEOUS SERVICES	553 765	1 145 735	59 188	33 622	12 004	8 738	3 320	863	473	118	50
--	ADMINISTRATIVE AND AUXILIARY	56 303	99 225	2 662	1 027	707	488	229	103	72	21	15
...	UNCLASSIFIED ESTABLISHMENTS	365 149	410 191	67 807	59 586	15 671	9 794	2 756	-	-	-	-

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 4 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-189

INLAND TRUCKING CO. and WESLEY MEILAHN, Co-Partners d/b/a OSHKOSH READY MIX CO; COOK & BROWN LIME CO; INLAND TRUCKING CO., and WESLEY MEILAHN, Co-Partners d/b/a WAUPUN READY MIX,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

GENERAL TEAMSTERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

BRIEF

For General Teamsters, Warehouse and Dairy Employees, Local Union No. 126, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in Opposition

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 440 F.2d 462 and in the Appendix to the Petition for a Writ of Certiorari at page 4. The Decision and Order of the National Labor Relations Board is reported at 179 NLRB No. 56 and in the Appendix to the Petition at page 11.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1971 (App. A). The petition for a writ of certiorari was docketed on August 7, 1971. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254 (1) and § 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (e).

QUESTION PRESENTED

Whether the Court of Appeals properly sustained the findings of the National Labor Relations Board that an employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act by locking out his employees at a time when no strike was imminent and then employing work replacements to continue his operations during that lockout.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are printed at page 3 of the petition.

STATEMENT

The facts of this case were fully explicated by the Trial Examiner in the decision which was adopted by the Board and the Court of Appeals (App. 5, 19-28).

Teamsters Local 126 has been negotiating collective agreements with Petitioner Cook & Brown Lime Co. for almost 40 years, and until the lockout here in issue, there was never a work stoppage by those employees. Petitioners Waupun Ready Mix Co. and Oshkosh Ready Mix Co. have enjoyed equally strike-free relations with the Union, although they are much younger firms. Indeed, the rec-

ord offers no evidence whatsoever of any work stoppage in connection with contract negotiations between the Union and any of the Petitioners.

In 1968 the Union began negotiating with each company individually; these were separate bargaining units, but Oshkosh Ready Mix and Cook & Brown sat at the same table. After only five or six bargaining sessions, Oshkosh and Cook & Brown announced that they would lock out the next day, at the expiration of the then-current contract. When the Union received a telegram confirming this position, it responded with its own telegram, stating that it had no intention of striking at the expiration of the contracts, and, further, promising that each company would be given no less than one week's notice prior to any strike action. Thus, the employers locked out before a bargaining impasse, at a time when they had been assured there would be no strike, and in the context of a bargaining relationship which had never before been interrupted by any strike.

Beyond simply locking out, the employers then hired new employees to replace those represented by the Union. While it appears that the new hires were told they might be temporary, neither the Union nor the locked out employees were informed of this. Thus, even when Waupun's locked out employees offered to resume work on the basis of the employer's last offer, Petitioners refused reinstatement and continued operations with the new employees.

The three employers abandoned their lock out after ten weeks and allowed their original employees to return to work on the conditions set forth in the letter announcing this move. A few days later the Union struck Oshkosh and Cook & Brown; a contract settled the Cook & Brown dispute, but the Oshkosh strike continued until the Union was decertified the following year.

ARGUMENT

The Court of Appeals affirmed the National Labor Relations Board's determination that a single employer lock out[1] supported by the use of new hires was inherently destructive of employee rights. The Court concluded that,

> "Such lock out forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer's ability to withstand a strike of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operations. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and context of that right, as protected in 29 USC § 157" (Appendix to Petition, at App. 8; the Board's discussion on this point is found at App. 43-44).

Thus, the Court of Appeals and the Board have held that the use of the lockout as a weapon in collective bargaining is not unlimited and the fact that it is permitted in defensive efforts to protect the integrity of a multi-employer bargaining unit against a "whipsaw strike"

---

[1] Throughout the case, the bargaining relationship has been treated as three single employer bargaining units, not a multi-employer unit of the type in **NLRB v. Brown**, 380 US 278, and **NLRB v. Truck Drivers Union (Buffalo Linen)**, 353 US 87.

(as in **Brown**, *supra*, and **Buffalo Linen**, *supra*), does not mean that it can be combined with the use of temporary replacements as an offensive means to chill employee support for bargaining.

Petitioners assert that the decisions below conflict with established principles, invite reversal, and, if allowed to stand, impair free collective bargaining. But the opinions in this case acknowledge the special needs of multi-employer bargaining, which warranted the use of replacements in **Brown**, but not in **American Ship Building Company v. NLRB**, 380 US 300, 308, note 8. The Board and the Court below held that employee rights may not be shattered by a weapon inherently destructive of legally protected activities; and far from interfering with legitimate collective bargaining tactics, these decisions constitute the determination that the use of replacement workers in single employer lockouts will inevitably "entail subordinating expressly protected employee rights in favor of non-expressly protected employer interests to a degree not involved in the validation of the bargaining lockout itself."[2]

Petitioners do not claim that the decision below conflicts with decisions by other Courts of Appeal. There is no allegation that this Court's opinions in **American Ship Building** and **Brown Food** authorized the actions here found to be violations. Rather, they complain because the decisions below accept the proposition that,

> ". . . The single employer who chooses to lock out for bargaining purposes should resign himself to paying the price of a temporary cessation of business. Since he is himself responsible for his dilemma with

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[2] Oberer, **Lockouts and the Law: The Impact of American Ship Building and Brown Food**, 51 Cornell L.Q. 193 (1966), 222; see also: **NLRB v. Erie Resistor Corp.**, 373 US 221.

respect to continued operations, he might fairly be required to take the bitter with the sweet. Put otherwise, his total conduct—the bargaining lock out, **plus** the hiring of temporary nonunion replacements—might be said to 'carry its own indicia of unlawful intent.' " **Oberer**, *supra.*

Petitioners' tactic has been found inherently destructive of employee rights, for it effectively acts as a reprisal for Section 7 activities. Oberer, *supra*, 221-222. This finding neither impairs free collective bargaining nor conflicts with this Court's rulings, but, instead, protects realistic employee participation in the bargaining process.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted

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No. 71-189

In the Supreme Court of the United States

OCTOBER TERM, 1971

INLAND TRUCKING CO., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-10) is reported at 440 F. 2d 562. The decision and order of the National Labor Relations Board (Pet. App. 11-56) are reported at 179 NLRB No. 56.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on May 12, 1971. The petition for a writ of certiorari was filed on August 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

443-546—71——1

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) and (3) of the National Labor Relations Act by locking out his employees and employing temporary replacements in their stead, in order to secure [redacted] contract terms.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Oshkosh Ready-Mix and Waupun Ready-Mix are companies engaged in the sale and delivery of ready-mixed concrete to the building and construction industry in Wisconsin. Cook & Brown is a company engaged in the fabrication of steel products, and the sale and delivery of ready-mixed concrete, fuel oils, steel products, and other related products. (Pet. App. 14–15.) In 1965, all three companies negotiated separate contracts with the Union—General Teamsters, etc., Local Union No. 126—which expired on May 1, 1968 (Pet. App. 19).

From March 29 to April 30, 1968, Cook & Brown and Oshkosh Ready-Mix negotiated jointly with the Union for new contracts (Pet. App. 20–21).[1] On April 30,

[1] Prior to these negotiations, Wesley Meilahn, a co-owner of both Oshkosh Ready-Mix and Waupun, told the Union that he wanted to delay discussion of the Waupun contract until the Oshkosh negotiations were concluded because he desired to con-

Attorney Mueller, representing both companies, told Union representative Wetzel that, unless the companies' current offer were accepted, the companies would lock out the employees upon expiration of the contracts. On May 1, a telegram was sent to the Union confirming Mueller's statement (Pet. App. 21; A. 100–101, 108, 219.),[2] and the companies handed each employee a notice reading (Pet. App. 21–22; A. 70–71, 220–222):

> Negotiations with the Union yesterday ended in deadlock. Our last proposal included a 90 cent wage package (30 cents each year of a 3-year contract) plus other fringes. The Union refused to budge from its previous wage demands totaling $1.85 over 3 years. We advised the Union at the meeting that there would be no work without a contract.
>
> The current labor contract expires at midnight today, May 1, 1968. We believe the Union's refusal to compromise its wage demands has created an unfortunate situation which forces us to engage in a lockout. You are hereby notified not to report to work until further notice.

---

tinue the arrangement under which both companies had similar contracts except for a wage differential of 25 cents (Pet. App. 20).

[2] Following receipt of this telegram, the Union sent each company, including Waupun, a telegram stating that it had no intention of striking at the expiration of the contracts, and promising that, if it changed its mind, it would give each company at least one week's notice (Pet. App. 23; A. 222–223).

"A." refers to the Appendix to the briefs in the court of appeals.

As of May 2, 1968, Cook & Brown had 29 employees on its payroll, including 8 who were on seasonal layoff; Oshkosh had 8 employees at work and 2 on layoff; and Waupun had 4 employees at work. None of these were permitted to return to work until July 17, 1968. (Pet. App. 22; A. 66–69, 146–147, 217–219.) Meanwhile—beginning on May 2—the work ordinarily done by the locked out employees was performed by supervisory employees and by new employees (Pet. App. 22; A. 144–145, 151, 170–172). The companies advised new employees that their tenure might be brief (Pet. App. 22; A. 171).[3]

On several occasions during the lockout the companies refused requests by the Union that the locked-out employees be reinstated—insisting that reinstatement would occur only when agreement was reached with the Union (Pet. App. 24; A. 159–160, 180). On July 15, the companies notified the locked-out employees that, upon application, they would be reinstated on July 17, at a rate of pay specified in the letter and otherwise under the conditions of the expired contracts (Pet. App. 24; A. 226). On July 17, all of the locked-out employees of Cook & Brown returned to work, except one who had quit. At Oshkosh, of the 8 employees who were locked out, 3 quit, 4 returned on July 17, and 1 indicated an intent to return on July 22; 2 other employees who were on layoff at the time of the lockout were also recalled.

[3] Cook & Brown hired 9 new employees by June 15; Oshkosh 12, by June 10; and Waupun 4, by June 19 (Pet. App. 22; A. 69, 157–158, 218).

At Waupun, all 4 employees returned to work. (Pet. App. 12, n. 1, 24–25; A. 79–81.)

B. THE DECISIONS BELOW

The Board found that the companies did not constitute a true multi-employer bargaining unit, but rather bargained with the Union in separate units (Pet. App. 37). The Board further found that, while each company was privileged to lock out its employees in support of its bargaining position, the companies had not established a sufficient business justification for their action in continuing to operate with temporary replacements—an action which was far more destructive of the employees' right to engage in collective bargaining than is a mere lockout (Pet. App. 40–50). Accordingly, the Board concluded that, by continuing to operate with temporary replacements, the companies violated Section 8(a)(1) and (3) of the Act (Pet. App. 50–51). The Board ordered the companies to cease and desist from the unfair labor practices found, to reinstate all of the locked-out employees, and to reimburse them for any loss in earnings (Pet. App. 52–55).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 4–10).

ARGUMENT

The holding of the court below that an employer violates the National Labor Relations Act by locking out his employees and then continuing operations with

temporary replacements is correct and not in conflict with any other decision.

1. In *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, this Court held that "an employer violates neither §8(a)(1) nor §8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position" (p. 318). The Court concluded that, in the absence of a specific showing of anti-union motivation, a lockout in these circumstances is neither so destructive of employee rights nor so lacking in significant economic justification as to constitute a violation of those provisions of the Act. The Court made plain, however, that its holding was limited to the situation there presented, stating: "we intimate no view whatever as to the consequences which would follow had the employer replaced his employees with permanent replacements or even temporary help. *Id.* at 308, n. 8. The latter situation is presented here, and the Board and the court below reasonably concluded that it called for an unfair labor practice finding.

Where an employer locks out his regular employees but continues to operate with temporary replacements, the coercive impact of such conduct on the former is substantially greater than that resulting from a lockout alone. As the court below noted (Pet. App. 8), it "would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of

their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation."; "[e]mployees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain." In these circumstances, at least in the absence of a showing of a legitimate and substantial business justification for the continued operation (which petitioners failed to make here, see Pet. App. 9–10), it is proper to conclude that the employer's action violated Section 8(a)(1) and (3) of the Act even without specific proof of anti-union motivation. See *National Labor Relations Board* v. *Great Dane Trailers*, 388 U.S. 26, 34; *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378.

2. *National Labor Relations Board* v. *Brown*, 380 U.S. 278, does not require a contrary conclusion. The Court there held that the non-struck members of a multiemployer bargaining group, who had locked out their members in response to a whipsaw strike against another member of the group (Food Jet), did not violate Section 8(a)(1) and (3) of the Act by resuming operations with temporary replacements when the struck employer did so. This "was all part and parcel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike. Since Food Jet legitimately continued business operations, it is only reasonable to regard respondents'

action as evincing concern that the integrity of the employer group was threatened unless they also managed to stay open for business during the lockout." Id. at 284. Here, by contrast, the Union had not struck any of the employers prior to the lockout; nor was there a multiemployer unit to protect against whipsaw tactics (see *supra*, p. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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